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Supreme Court, U.S.
FILED
NOV 26 1993
OFFICE OF THE CLERK

No. 93-5209

In The

Supreme Court of the United States

October Term, 1993

DARREN J. CUSTIS

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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67 pp

QUESTION PRESENTED

Whether a defendant may challenge, in a federal sentencing proceeding, the constitutional validity of prior convictions offered by the government for sentencing enhancement under 18 U.S.C § 924(e).

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OPINIONS BELOW

The opinion of the court of appeals and order denying rehearing are reported at 988 F.2d 1355 (reprinted at J.A. 135-155). The opinion of the district court (J.A. 124-134) is reported at 786 F. Supp. 533 (D. Md. 1992).

JURISDICTION

The judgment of the Fourth Circuit was entered on March 22, 1993. J.A. 135. A timely Petition for Rehearing was denied on April 30, 1993, with four judges voting to hear the case in banc. J.A. 154-155. The petition for a writ of certiorari was filed on July 15, 1993, and granted on October 12, 1993, limited to Question 1 presented by the petition. J.A. 156. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution are reproduced at App. 1a. The relevant provisions of 18 U.S.C. §§ 921, 922, and 924 (Supp. 1993) are reproduced at App. 1a-3a.

STATEMENT OF THE CASE

In September 1991, Petitioner Darren J. Custis was indicted in the United States District Court for the District of Maryland for possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count One); use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c) (Count Two); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Three). J.A. 3-5. Testifying at trial, Custis admitted possessing a small amount of cocaine for personal use, but denied possessing additional amounts of cocaine or the gun. J.A. 138. The jury acquitted Custis of possession of cocaine with intent to distribute (Count One) and use of a firearm during a drug trafficking offense (Count Two). The jury found him guilty, however, of possession of a firearm by a convicted felon (Count Three) and simple possession of cocaine, a misdemeanor and lesser included offense of Count One. J.A. 118.

1. Sentencing

Section 924(e) of title 18 U.S.C., commonly referred to as the Armed Career Criminal Act, raises the penalty for possession of a firearm by a felon from a maximum of 10 years in prison to a mandatory minimum of 15 years and a maximum of life in prison without parole if the defendant "has three previous convictions * * * for a violent felony or a serious drug offense * * * * " The government sought application of Section 924(e), filing a written notice that listed three prior convictions rendered by state

courts in Pennsylvania and Maryland: (1) a 1985 conviction in Pennsylvania state court for robbery; (2) a 1985 conviction in Maryland state court for burglary; and (3) a 1989 conviction in Maryland state court for attempted breaking and entering. J.A. 6-7.[1] The government did not offer state court judgments of the convictions.

Prior to the sentencing hearing, Mr. Custis asserted that Section 924(e)'s statutory minimum penalty could not apply, because both Maryland convictions were constitutionally invalid. The 1985 conviction for burglary resulted from a guilty plea. The transcript of the guilty plea, which Custis provided for the district court, affirmatively demonstrated that his lawyer did not advise him of any possible defenses, that he could have asserted a defense, and that he was "confus[ed]" during the guilty plea proceeding. J.A. 10-42.[2] Custis received a sentence of

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[1] The government's notice of enhanced penalty mistakenly described the 1989 Maryland conviction as having been for attempted burglary. J.A. 7. While this case was pending before the court of appeals, however, the Circuit Court for Baltimore County issued an order correcting the record to reflect that Custis was convicted of attempted breaking and entering. The court of appeals supplemented the record with that correction. J.A. 152 n.3.

[2] The transcript records the following colloquy:

> THE COURT: Has [your lawyer] given you certain advice as to whether or not to plead guilty, whether or not to accept the agreement? Has she given you that advice?
> THE DEFENDANT: Somewhat.
> THE COURT: Has she told you in the past the pssible [sic] defense you might have in this case?
> THE DEFENDANT: No.

eight years, with three years suspended, to run concurrently with a Pennsylvania sentence Custis was then serving. J.A. 41. Custis asserted before the district court in this case that if he had known of his possible defenses in the earlier case, he would have exercised his right to stand trial. Def. Memo., 2/26/92, Docket No. 42, pp. 1-8. Accordingly, Custis argued, his guilty plea was not knowingly and voluntarily made, and resulted from denial of effective assistance of counsel, and for both those reasons could not be counted as a prior conviction for purposes of Section 924(e). *Id.*

Custis also challenged the 1989 conviction for attempted breaking and entering which had resulted in a sentence of two years, all suspended, without any term of probation. J.A. 47-48. That conviction was entered upon a

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> THE COURT: She has not told you what defenses you might have had or that you didn't have any?
> THE DEFENDANT: No.
> THE COURT: Has she discussed the case with you?
> THE DEFENDANT: Yes, somewhat but it's been confusing.
> THE COURT: What's been confusing?
> THE DEFENDANT: The whole thing really has been confusing.

J.A. 26-27. Following this exchange, the state trial judge asked Custis whether he was satisfied with the services of his lawyer and her understanding of the law. Custis responded affirmatively. J.A. 28-29. The judge then advised "So having said that, the propbability [sic] is you would not be able to win if you appealed on the competency of your counsel." J.A. 29. Custis then asked for a moment to speak with his attorney. J.A. 29. There was no further discussion of his confusion or counsel's failure to advise him of defenses. J.A. 29-42.

plea of not guilty upon an agreed statement of facts.[3] Relying on a five page transcript of that proceeding (J.A. 43-48), Custis argued that it was essentially equivalent to a guilty plea, that the transcript did not establish a knowing and voluntary plea, and, alternatively, that even if the proceeding was not treated as a guilty plea, it was fundamentally unfair. Def. Memo., 2/26/92, Docket No. 42, pp. 8-11. At sentencing, counsel for Custis also challenged the 1989 conviction on grounds of ineffective assistance of counsel. J.A. 69-70. The government did not claim that these constitutional challenges could not be heard by the district court nor did it respond in any other way to Custis's arguments.

If either of the two convictions Custis challenged was not used for enhancement under Section 924(e), the statutory *maximum* sentence under 18 U.S.C. § 924(a)(2) would have been ten years and the Sentencing Guidelines would have prescribed a range of 33 to 41 months. If all three convictions were counted under the Armed Career Criminal Act, however, the statutory *minimum* sentence would be fifteen years, and the Sentencing Guidelines would prescribe a sentencing range of 235 to 293 months.[4] Thus,

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[3] Although this procedure "finds no express support in the [Maryland] Rules relative to Criminal Causes," *Stevenson v. State*, 37 Md. App. 635, 636, 378 A.2d 209, 210 (1977), it is often used by counsel because it is less time consuming than a plea of guilty and minimizes post-conviction attacks on counsel. *Id.* at 637 n.5, 378 A.2d at 211 n. 5. "[T]he plea is one of expediency and ofttimes is employed as a 'back handed plea of guilty.'" *Yanes v. State*, 52 Md. App. 150, 154, 448 A.2d 359, 362 (1982).

[4] The sentencing guideline for armed career criminals, guideline § 4B1.4, applies only to "[a] defendant who is subject

the counting of each of the two Maryland convictions resulted in a federal sentence approximately sixteen years longer than the sentence of about three years that otherwise would have been imposed.

In an initial letter ruling on the matter, the district court concluded that counsel's failure in 1985 to explore possible defenses with the defendant could constitute performance below the applicable standards of professional competence. Order of 2/27/92, Docket No. 46 at p. 1. The court observed that the dispositive issue was whether there was a reasonable probability that more complete information from counsel would have led Custis to decline the plea agreement and insist on going to trial. *Id.* at 2. The court deferred ruling on that issue until the sentencing hearing, noting that it should hear testimony before deciding the merits. *Id.* at 2. In addition, the court preliminarily rejected Custis's claims regarding the 1989 conviction, finding that the proceeding was not the functional equivalent of a guilty plea and was not fundamentally unfair. *Id.* at 2-3.

On March 5, 1992, the district court *sua sponte* reversed its position and issued a second letter ruling in which it refused to consider the constitutional validity of Custis's prior convictions. Order of 3/5/92, Docket No. 52. The court ruled that "collateral attacks on prior convictions will not be entertained except possibly on

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to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)." United States Sentencing Commission, Guidelines Manual, § 4B1.4(a) (Nov. 1990). Thus, application of Section 924(e) was dispositive of the sentencing guideline range.

grounds of outright deprivation of the right to be represented by counsel. Because Custis was represented by counsel at both proceedings attacked in this case, I shall not consider the matter any further at sentencing." *Id.*

At the sentencing hearing conducted on March 6, 1992, the court declined to take evidence or make findings on the validity of Custis's prior convictions. J.A. 51. The court explained that "[a]s long as the lawyer is alive at the time of trial and is breathing and is physically present, there is no violation of *Gideon* * * * [and] that is the end of it in terms of this inquiry on a 924(e) collateral conviction." J.A. 70. Counting all three prior convictions as violent felonies, the court imposed a prison sentence of 235 months on Count Three (the minimum sentence prescribed by the guidelines for defendants to whom the Armed Career Criminal Act applies), and a concurrent sentence of 12 months for the misdemeanor drug offense. J.A. 120. After the sentencing hearing, the court issued a written opinion setting forth the same reasons previously given for refusing to consider Custis's arguments. J.A. 124-134.

2. Opinion of the Court of Appeals

The court of appeals affirmed in pertinent part.[5] J.A. 135-155. The court recognized that the Constitution

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[5] Apart from the sentencing issue discussed above, the district court ruled that the 1989 conviction for attempted breaking and entering counted as a "violent felony" under Section 924(e)(2)(B)(ii). J.A. 68. In addition, after imposing sentence on Custis, the court ordered a new trial on grounds that two key prosecution witnesses had been indicted for perjury. J.A. 132-134. The Fourth Circuit affirmed the sentencing ruling and reversed the grant of a new trial. J.A. 144; 152-153.

forbids imposition of an enhanced sentence based on a prior conviction that resulted from a complete denial of counsel. J.A. 145. It believed, however, that violations of *Gideon v. Wainwright*, 372 U.S. 335 (1963), are "different in kind" from the claims that Custis asserted. J.A. 145. The court thought that permitting consideration of such claims "would place a substantial burden both on the prosecutors who will be forced to defend the predicate convictions used in sentence enhancement, and on the district judges who will be forced to hear those challenges," and might unduly delay and lengthen the sentencing process. J.A. 146. In addition, the court stated that permitting federal defendants to assert constitutional challenges to prior convictions during sentencing would impair comity and federalism. J.A. 147. Although it observed that considering Custis's challenges would not directly affect the state convictions, the court opined that a state court conviction "commands respect, in whatever forum and for whatever purposes it has come under challenge." J.A. 147.

The court therefore announced that "we think that district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." J.A. 149. Applying this test to Custis's claims, the court held that a district court need not consider whether prior convictions were obtained in violation of the right to effective assistance of counsel or whether they were obtained through an unknowing and

involuntary guilty plea, because establishing either type of claim entails a "fact-intensive inquiry." J.A. 149-151. The court suggested, however, that if Custis successfully pursued his claims in state and federal courts through post-conviction and habeas proceedings, he might then seek revision of the sentence imposed in this case. J.A. 151.

SUMMARY OF ARGUMENT

This Court established more than two decades ago that prior convictions obtained in violation of the right to counsel cannot be used to enhance punishment. *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972). Allowing the use of unconstitutional prior convictions to enhance punishment erodes constitutional principles, the Court has explained, and forces the accused to suffer anew from the deprivation of his constitutional rights. *Tucker*, 404 U.S. at 449. Unlike the court of appeals in this case, at least eight other circuits have uniformly considered constitutional challenges to prior convictions offered for sentencing enhancement under 18 U.S.C. § 924(e), commonly referred to as the Armed Career Criminal Act.

Congress has not attempted to limit judicial consideration of such challenges. When the Armed Career Criminal Act was enacted in 1984, it was settled law and established practice that courts would entertain constitutional challenges to prior convictions offered to enhance a criminal sentence. If Congress had intended to abrogate federal court review of prior convictions in the context of

sentencing enhancement, it would have made its intent express, especially given the constitutional overtones of the decisions. Instead, it enacted a statute which is silent on whether prior convictions can be challenged on constitutional grounds. Moreover, while Congress has enacted amendments to correct other judicial interpretations of the firearms laws that departed from the original legislative intent, it has not responded to the many court decisions permitting defendants to challenge prior convictions offered for enhancement under the Armed Career Criminal Act.

The court below recognized that some constitutional challenges must be entertained. The court announced, however, that it would permit review of only three constitutional violations: the right to counsel, adjudication by a biased judge, and direction of a guilty verdict. The two constitutional claims at issue here involve fundamental rights and merit review by the sentencing court. The right to effective assistance of counsel is indistinguishable as a matter of principle from the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963). A defendant who establishes ineffective assistance of counsel has necessarily shown that the proceeding resulting in his conviction was flawed and that the result of the proceeding is unreliable. Likewise, acceptance of a plea of guilt which was not knowingly and voluntarily made deprives the defendant of the most fundamental federal rights guaranteed the accused under the Bill of Rights, including the right to a jury trial, the privilege against self-incrimination, and the right to confrontation. Imposition of a more severe sentence based on convictions obtained in violation of the right to effective assistance of counsel

or based on an unknowing and involuntary guilty plea erodes constitutional principles and forces defendants to suffer anew from the earlier deprivation of their constitutional rights. By permitting review of some violations while denying review of the claims at issue here, the Fourth Circuit has created an arbitrary scheme for determining which defendants will be subject to the mandatory minimum fifteen-year sentence under Section 924(e).

The reasons relied on by the court below fail to support its decision. First, recognition of constitutional violations should not depend upon the degree of factual inquiry required to review a claim. Second, principles of comity and federalism do not weigh in favor of prohibiting review. Maryland has expressly invited other jurisdictions to examine the validity of prior convictions before using them for sentencing enhancement. Considerations of comity are largely absent because the exercise of judicial power in federal sentencing does not interfere with the state's authority. The limitation of federal court review of prior state convictions actually undermines comity concerns by burdening busy state courts with litigation on federal questions in which the state has no interest.

Third, the Fourth Circuit's concern that allowing federal courts to hear constitutional challenges to prior convictions will unduly complicate federal sentencing proceedings is unwarranted. There is no evidence that the eight circuits that routinely entertain such challenges have experienced any problem with resolving constitutional claims fairly and expeditiously. Those courts have placed the burden of proving constitutional challenges on

the defendant, and the courts have developed procedural rules that ensure efficient disposition of claims.

ARGUMENT

I. CONSTITUTIONALLY INVALID CONVICTIONS CANNOT BE A BASIS FOR SENTENCING ENHANCEMENT UNDER 18 U.S.C. SECTION 924(e)

A. Decisions of This Court and Eight Circuits Prohibit Use of Unconstitutional Prior Convictions to Enhance Punishment

It has been settled for over twenty years that the Constitution forbids use of an unconstitutional prior conviction to enhance a criminal sentence. In *Burgett v. Texas*, 389 U.S. 109 (1967), the Court held that a conviction obtained in violation of *Gideon v. Wainwright*[6] may not "be used against a person either to support guilt or enhance punishment for another offense." *Id.* at 115. As the Court explained, allowing such use of the prior conviction would not only erode the principle of *Gideon*, but also would force "the accused in effect [to] suffer[] anew from the deprivation of that Sixth Amendment right." *Id.* Following *Burgett*, the Court held in *United States v. Tucker*, 404 U.S. 443 (1972), that a federal district court could not rely, in sentencing a defendant for bank robbery, on prior state convictions that were obtained in violation of the right to counsel. 404 U.S. at 449. The

[6] 372 U.S. 335 (1963).

Court explained that although a sentencing court generally has wide discretion in determining what sentence to impose, the Constitution prohibits imposition of a sentence based in part upon "misinformation of constitutional magnitude." *Id.* In addition, as in *Burgett*, erosion of *Gideon* could be prevented only by resentencing without regard to the prior convictions. *Id.*

Unlike the court of appeals in this case, every other federal circuit to consider the issue has uniformly permitted defendants to challenge the constitutional validity of prior state convictions when offered by the government for sentencing enhancement under Section 924(e). Decisions of the First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits reflect that reliance on unconstitutional prior convictions in sentencing compromises vital federal rights. In those circuits, courts routinely examine prior convictions for constitutional defects – including the very violations Custis asserted below – before relying on them to enhance punishment under the Armed Career Criminal Act. *See, e.g., United States v. Paleo*, 967 F.2d 7, 11 (1st Cir. 1992) (permitting challenge on grounds that two convictions were obtained in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969)); *United States v. Preston*, 910 F.2d 81, 87-89 (3rd Cir. 1990) (ineffective assistance of counsel), *cert. denied*, 498 U.S. 1103 (1991); *United States v. Taylor*, 882 F.2d 1018, 1031 (6th Cir. 1989) (guilty plea not knowing and voluntary), *cert. denied*, 496 U.S. 907 (1990); *United States v. Gallman*, 907 F.2d 639, 642-44 (7th Cir. 1990) (same), *cert. denied*, 449 U.S. 908 (1991); *United States v. Day*, 949 F.2d 973, 981-84 (8th Cir. 1991) (failure to hold competency hearing); *United States v. Clawson*, 831 F.2d 909, 914-15 (9th Cir.

1987) (enhancement under 18 U.S.C. App. section 1202(a), ineffective assistance of counsel), *cert. denied*, 488 U.S. 923 (1988); *United States v. Wicks*, 995 F.2d 964, 978 (10th Cir. 1993) (inadequate plea colloquy), *cert. denied*, (Nov. 15, 1993) (No. 93-6303); *United States v. Ruo*, 943 F.2d 1274, 1276-77 (11th Cir. 1991) (guilty pleas not knowing and voluntary).[7] The Fourth Circuit did not address or acknowledge these decisions in its opinion.

Nearly all of these courts reviewed the constitutionality of prior convictions without apparent objection from the government. In fact, the Department of Justice Manual itself recognizes that "a constitutionally invalid felony conviction should not be used to enhance a defendant's sentence." Dep't of Justice Manual, Vol. 9, § 63.515, p. 9-1327 (1989-2 Supp.)(citations omitted).

The Fourth Circuit stands alone among the circuits in sharply limiting the constitutional violations a court may consider.[8] In permitting review of claims that a prior

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[7] *See also United States v. Stewart*, 977 F.2d 81, 84-85 (3rd Cir. 1992) (*Boykin* challenges), *cert. denied*, 113 S. Ct. 1433 (1993); *United States v. Henry*, 933 F.2d 553, 558-61 (7th Cir. 1991) (ineffective assistance of counsel and *Boykin* challenges), *cert. denied*, 112 S. Ct. 1703 (1992); *United States v. White*, 890 F.2d 1033, 1035-36 (8th Cir. 1989) (*Boykin* violations); *United States v. Mulloy*, 3 F.3d 1337, 1339-42 (9th Cir. 1993) (plea not knowing or voluntary); *Greene v. United States*, 880 F.2d 1299, 1305-06 (11th Cir. 1989) (ineffective assistance of counsel), *cert. denied*, 494 U.S. 1018 (1990).

[8] Some circuits require or permit district courts to examine the constitutional validity of prior convictions when used for enhancement purposes under the Sentencing Guidelines. *E.g.*, *United States v. Brown*, 991 F.2d 1162, 1165-66 (3rd Cir. 1993); *United States v. Vea-Gonzales*, 999 F.2d 1326, 1330-34 (9th Cir. 1993); *United States v. Canales*, 960 F.2d 1311, 1314-15 (5th Cir. 1992); *United States v. Jakobetz*, 955 F.2d 786, 804-05 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992). Other circuits have limited constitutional challenges to prior convictions under the sentencing guidelines. *United States v. Byrd*, 995 F.2d 536, 539-40 (4th Cir. 1993) (applying *Custis* holding to sentencing guidelines case), *petition for cert. filed*, (Oct. 18, 1993) (No. 93-6385); *United States v. Isaacs*, ___ F.3d ___, 1993 Westlaw 210537 (1st Cir. 1993), *petition for reh'g filed*, (Jul. 12, 1993) (constitutional violation must be found on face of prior conviction without further factual inquiry); *United States v. McGlocklin*, ___ F.3d ___ , 62 U.S.L.W. 2230 (6th Cir. 1993) (en banc) (discretion to permit challenges); *United States v. Roman*, 989 F.2d 1117, 1119-20 (11th Cir. 1993) (en banc) (challenges permitted when convictions are presumptively void), *petition for cert. filed*, (Jul. 29, 1993) (No. 93-5464); *United States v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir. 1991) (no challenges permitted unless conviction previously ruled invalid).

conviction was obtained in violation of the right to counsel, while denying review of claims that a prior conviction was obtained in violation of the right to effective assistance of counsel or through an unknowing and involuntary plea, the Fourth Circuit has created an unconstitutional sentencing scheme under Section 924(e). Contrary to this Court's teachings in *Burgett* and *Tucker*, this scheme erodes constitutional principles and forces defendants to "suffer anew" from the deprivation of constitutional rights.

B. Congress Has Not Limited Judicial Consideration of Constitutional Challenges to Prior Convictions Offered for Sentencing Enhancement under Section 924(e)

The Armed Career Criminal Act of 1984 is codified at 18 U.S.C. § 924(e),[9] and provides in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * * [4]
>
> (2) As used in this subsection –
>
> * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult that –

[9] The Armed Career Criminal Act was originally enacted in 1984 as an amendment to Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 98-473, § 1802, 98 Stat. 2185 (1984), and was codified at 18 U.S.C. App. § 1202(a). In 1986, the enhanced penalty provision of Section 1202(a) was recodified with a minor change as 18 U.S.C. § 924(e) and made applicable to violations of 18 U.S.C. § 922(g). *See* Firearms Owners' Protection Act of 1986, Pub. L. 99-308, § 104(a), 100 Stat. 458. The conforming repeal of 18 U.S.C. App. §§ 1201-1203, which included the original Armed Career Criminal Act, took place at the same time. Pub. L. 99-308, § 104(b), 100 Stat. 459 (1986).

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
>
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(e) (Supp. 1993).

The language of the statute does not address whether previous convictions obtained in violation of the Constitution can be relied upon for sentencing enhancement. From its enactment to the present, however, courts in at least eight circuits have uniformly permitted defendants to challenge the constitutionality of prior convictions offered for enhancement under the Armed Career Criminal Act. *See supra* at pp. 13-14. No court, not even the court below, has suggested that the statute restricts a sentencing court's consideration of the validity of prior convictions.[10]

In *United States v. Paleo*, 967 F.2d 7, 11 (1st Cir. 1992), the First Circuit interpreted the statute as authorizing constitutional challenges to prior convictions used for sentencing enhancement under Section 924(e). As Judge

[10] The Fourth Circuit noted only that "Congress has not specifically directed the federal courts to examine the validity of predicate convictions in sentencing proceedings." J.A. 147, n.2.

Breyer explained for the court, nothing in the statute prevents federal courts from exercising their traditional substantive and procedural powers in sentencing nor requires courts to enhance punishment based on a prior conviction obtained in violation of the Constitution. *United States v. Paleo*, ___ F.3d ___, 1992 WL 545126 (order den. rehr'g)(1st Cir. Sept. 14, 1992), citing *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

That interpretation of the statute is well grounded. When the terms of a statute are silent on an issue, the "initial focus must be on the state of the law at the time the legislation was enacted." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982). It is appropriate to assume that Congress knows the state of existing law and legislates with it in mind. *Albernaz v. United States*, 450 U.S. 333, 341-42 (1981). *See also Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979) (statute must be evaluated taking into account "contemporary legal context" in which it was enacted). Accordingly, "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) (citation omitted). Moreover, "[i]n areas where legislation might intrude on constitutional guarantees, * * * Congress, which also has sworn to protect the Constitution, would intend to err on the side of fundamental constitutional liberties when its legislation implicates those liberties." *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984) (Stevens, J., concurring in part and dissenting in part). *Accord United States v. Clark*, 445 U.S. 23, 27 (1980).

As explained *supra* at pp. 12-13, this Court established over a decade before the 1984 enactment of the Armed Career Criminal Act that constitutionally invalid prior convictions cannot be relied upon to support guilt or enhance punishment. *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *United States v. Tucker*, 404 U.S. 443, 448-49 (1972). Following *Burgett* and *Tucker*, the lower federal courts entertained a variety of constitutional challenges to prior convictions offered for sentencing enhancement. *See, e.g., United States v. Martinez*, 413 F.2d 61, 62-64 (7th Cir. 1969) (involuntary guilty plea and ineffective assistance of counsel); *Stubbs v. Mancusi*, 442 F.2d 561, 562-64 (2d Cir. 1971)(right to confrontation), *rev'd*, 408 U.S. 204 (1972)(finding no confrontation violation); *Martinez v. United States*, 464 F.2d 1289, 1290-91 (10th Cir. 1972) (privilege against self-incrimination); *Brown v. United States*, 610 F.2d 672, 674-75 (9th Cir. 1980) (ineffective assistance of counsel); *Morse v. Texas*, 691 F.2d 770, 771-73 (5th Cir. 1982) (involuntary guilty plea). Thus, when the Armed Career Criminal Act was enacted, it was both settled law and established practice that courts would entertain constitutional challenges to prior convictions offered to enhance a criminal sentence.[11] Particularly given the

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[11] Congress demonstrated its awareness of this principle as early as 1970, when it enacted the first general recidivist sentencing statute, the Dangerous Special Offender Sentencing statute, 18 U.S.C. §§ 3575-3576 (1985 & Supp. 1993). Pub. L. 91-452, Tit. X, § 1001(a), 84 Stat. 948 (1970), repealed effective 1987 by Pub. L. 98-473, Title II, c. II, § 212(a)(2), 98 Stat. 1987 (1984). Congress provided in the statute that invalid convictions were to be disregarded. 18 U.S.C. § 3575(e). The legislative history confirms that Congress believed the provision was compelled by *Burgett v. Texas*, 389 U.S. 109 (1967). *See* S. Rep. No. 617, 91st Cong., 1st Sess. 164 (1969).

constitutional overtones of these decisions, if Congress had intended to abrogate federal court review of prior convictions in the context of sentencing enhancement, it would have made that intent express.

Following enactment of the Armed Career Criminal Act, Congress has on several occasions amended the firearms statutes in response to specific court decisions. Those amendments demonstrate that Congress was aware of judicial interpretations of the statutes and corrected those that departed from the original legislative intent.[12] There has been no indication, however, that Congress wished to abrogate the widespread prevailing practice of federal court review of the constitutionality of convictions offered for enhanced sentencing. Given the number of reported decisions on this subject, *see supra* at pp. 13-14, the law and practice could not have escaped Congress's attention. Yet, while Congress corrected other court interpretations, it left standing the law that unconstitutional prior convictions may not be counted.

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[12] In 1986, the firearms laws were amended to narrow what counted as a conviction in response to court decisions. *See infra* at pp. 21-23. Pub. L. 99-308, § 101, 100 Stat. 449 (1986). In 1988, Section 924(e) was amended to clarify that the three previous convictions referred to in the statute had to be for "offenses committed on occasions different from one another." Pub. L. 100-690, § 7056, 102 Stat. 4402 (1988). Congress enacted this latter amendment in light of the government's construction of the statute in *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986), *vacated*, 481 U.S. 1034 (1987), *on remand*, 828 F.2d 2 (8th Cir. 1987). *See* 134 Cong. Rec. S17,370 (daily ed. Nov. 10, 1988) (section-by-section analysis); 134 Cong. Rec. S7449 (daily ed. June 8, 1988) (same).

In 1986, Congress amended 18 U.S.C. § 921(a)(20) to provide that convictions which have been expunged, set aside, or for which a person has been pardoned or received restoration of civil rights do not qualify as convictions for purposes of the firearms laws. Respondent suggests in its Brief responding to the Petition for Certiorari that this amendment may indicate that Congress intended for courts to rely on unconstitutional prior convictions that have not previously been set aside. No court has adopted that interpretation of the amendment, and neither the language nor the legislative history of the provision supports it.

Section 921(a)(20) was not originally enacted to govern sentencing in any respect. Rather, the provision was enacted in 1968 to exclude certain prior convictions from leading to various firearms prohibitions.[13] Section 921(a)(20) provides that the term "crime punishable by imprisonment for a term exceeding one year" does not include, *inter alia*, various white collar crimes and certain offenses classified by a State as a misdemeanor. In 1986, the Firearms Owners' Protection Act, Pub. L. 99-308, § 101, 100 Stat. 450, narrowed the statutory prohibition by adding these two sentences:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored

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[13] Pub. L. 90-618, § 102, 82 Stat. 1216 (1968).

> shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.[14]

18 U.S.C. § 921(a)(20) (1976 and Supp. 1993).

Contrary to the government's interpretation, Congress did not intend this language to abrogate the settled law that unconstitutional prior convictions, whether or not previously set aside,[15] cannot be used for sentencing enhancement under Section 924(e). Rather, Congress added these two sentences to Section 921(a)(20) to *narrow* the reach of the statute and *restrict* what qualifies as a conviction. The amendment was specifically crafted to repudiate two court decisions that extended the reach of firearms prohibitions and did not even address the mandatory minimum sentence set forth in the Armed Career Criminal Act, then codified at 18 U.S.C. App. § 1202. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 122 (1983)

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[14] The Firearms Owners' Protection Act of 1986 also recodified the Armed Career Criminal Act with a slight modification from 18 U.S.C. App. § 1202 to 18 U.S.C. § 924(e), and repealed sections 1201-1203, which included the original Armed Career Criminal Act. Pub. L. 99-308, § 104(b), 100 Stat. 459 (1986).

[15] The statute and its legislative history fail to reveal what Congress meant by the term "set aside" or why that term was included. The term has a variety of meanings. In some statutes, it is used to refer to a procedure similar to a pardon or expungement, procedures that are not concerned with a conviction's validity. *E.g.*, Federal Youth Corrections Act, 18 U.S.C. § 5021, (issuance of certificates "setting aside" convictions of youthful offenders), Pub. L. 865, c. 1115, § 2, 64 Stat. 1089 (1950); repealed Pub. L. 98-473, Tit. II, § 218(a)(8)(1984).

(sections 922(g)(1) and (h)(1) apply to prevent issuance of firearms license to defendant who received deferred judgment and expungement); *Thrall v. Wolfe*, 503 F.2d 313, 316 (7th Cir. 1974) (sections 922(g) and (h) bar license for defendant who received state pardon restoring civil rights), *cert. denied*, 420 U.S. 972 (1975). The Senate Report states that the amendment was designed to ensure that firearms prohibitions would not apply based on state proceedings such as those at issue in *Dickerson* and *Thrall*. S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984).[16] Thus, it is clear that Section 921(a)(20)'s restrictions on the reach of the firearms prohibitions were not intended to expand the penalty provisions of Section 924(e).[17]

In sum, the language, structure, and history of the Armed Career Criminal Act show that Congress did not intend to preclude federal courts from examining the

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[16] The Report states that as to the first sentence of the amendment, the term "conviction" would no longer include guilty pleas where no final judgment had been rendered, such as in *Dickerson*. S. Rep. No. 583, 98th Cong., 2d Sess. 7, n.16 (1984). The second sentence of the amendment to Section 921(a)(20) was intended to "exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record," and to abrogate *Thrall*. *Id.* at 7.

[17] When Congress intended to expand the penalty provisions of Section 924(e), it did so directly by adding language to that section. For example, in 1988 Congress added Section 924(e)(2)(C), which states: "As used in this subsection * * * the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." Pub. L. 100-690, § 6451, 102 Stat. 4371 (1988). Prior to this amendment, the statute was silent on juvenile convictions.

constitutionality of prior convictions relied upon for sentencing enhancement. This interpretation is consistent with the established law at the time of enactment of the Armed Career Criminal Act and the constitutional requirements of which Congress was aware.

C. The Fourth Circuit's Test Undermines the Integrity of Federal Sentencing by Arbitrarily Forbidding Judicial Review of Some Constitutional Violations While Permitting Review of Others

Both the court of appeals and the government acknowledge that federal courts must consider some constitutional challenges to prior convictions offered to invoke the mandatory minimum penalty of Section 924(e).[18] The test employed by the court of appeals, however, bars review of nearly all constitutional violations. As explained in a subsequent opinion of the court of appeals, the "test" announced in this case permits review of only three constitutional violations: (1) complete denial of counsel, (2) adjudication by a biased judge, and (3) direction of a guilty verdict by the court. *United States v. Bradshaw*, 999 F.2d 798, 800 (4th Cir. 1993), *petition for cert. filed*, (October 21, 1993) (No. 93-6448).[19]

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[18] J.A. 149; Brief of the United States in Response to Petition for Certiorari at 11-12.

[19] The Fourth Circuit provided no authority for the test it employed other than a citation by analogy to *Rose v. Clark*, 478 U.S. 570, 577-578 (1986); J.A. 149. In *Rose*, this Court noted that deprivations of the right to counsel, adjudication by a biased judge, and direction of a guilty verdict by a judge cannot be harmless. *Id.* at 577-78. Of course, other constitutional errors also cannot be harmless, yet are not recognized by the Fourth Circuit. *E.g.*, *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993) (constitutionally deficient reasonable-doubt instruction); *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992) (forced antipsychotic medication during trial without following proper procedures); *Vasquez v. Hillery*, 474 U.S. 254, 261-64 (1986) (exclusion of members of the defendant's race from grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 177-178 n.8 (1984) (right to self-representation); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (right to public trial); *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979) (failure to instruct jury on reasonable doubt standard). The Fourth Circuit did not attempt to explain why it chose to permit review of the errors mentioned in *Rose* while forbidding federal courts from considering other constitutional claims.

Even these violations are to be ignored under the Fourth Circuit test unless they undercut confidence in the defendant's guilt. *Id.* at 801. Thus, under the test employed by the Fourth Circuit, prior state court convictions involving nearly all constitutional violations, no matter how egregious or offensive, are deemed conclusively valid for purposes of sentencing enhancement under Section 924(e). This conclusive presumption that even unconstitutional convictions support sentencing enhancement severely undermines the integrity of federal sentencing.

The Fourth Circuit's prohibition on court review of nearly all constitutional violations impermissibly strips a defendant of constitutional protections long recognized by this Court. In permitting defendants who suffered from one of the three violations listed above to challenge the constitutionality of a prior conviction, while denying

the same opportunity to defendants who suffered ineffective assistance of counsel or entered unknowing and involuntary pleas, the Fourth Circuit has created an arbitrary scheme for determining which defendants will be subject to the mandatory minimum fifteen-year sentence under Section 924(e). Contrary to this Court's teachings in *Burgett* and *Tucker*, this scheme erodes constitutional principles and forces defendants to "suffer anew" from the deprivation of their constitutional rights.[20]

1. Ineffective Assistance of Counsel

As this Court observed half a century ago, the assistance of counsel is "necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). The right to counsel "assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Therefore, a defendant is entitled to an attorney whose advice is "within the range of competence demanded of

[20] In *Lewis v. United States*, 445 U.S. 55, 65 (1980), the Court held that a conviction not previously vacated may be used as a basis for a statutory prohibition against possession of firearms. The Court emphasized that the statute before it was regulatory in the sense that it regulated the behavior of felons by imposing essentially a civil disability. The statute did not involve sentencing enhancement, so that *Burgett* and *Tucker* were not implicated. *Id.* at 66-67. Thus, the *Lewis* opinion reflects the need for prospective knowledge of whether firearms possession is permitted. Custis's case involves a sentence enhancement scheme which is punitive, not regulatory, and no similar considerations preclude judicial review of convictions prior to their use for sentencing enhancement.

attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The court of appeals was compelled to acknowledge the importance of the right to counsel (J.A. 145), but asserted that *Gideon* violations are "different in kind" from other constitutional errors, including the denial of competent counsel. J.A. 145. The court's observation that a defendant who has been deprived of counsel has lost the ability to assert his other rights, and that the resulting conviction lacks reliability for that reason (J.A. 145), does not distinguish the right to the effective assistance of counsel. Rather, those are the very reasons the right to effective assistance exists.

In attempting to distinguish the denial of competent counsel from the total denial of counsel, the court of appeals failed to recognize that "the right to counsel is the right to the effective assistance of counsel." *McMann*, 397 U.S. at 771 n.14. The Sixth Amendment guarantees the defendant not merely the presence of a member of the bar, but actual "Assistance" which is to be "for his defence." There is no reason to assume that an incompetent lawyer offers greater assistance to a defendant than no counsel at all. On the contrary, an ineffective lawyer may affirmatively mislead a defendant or work against his interests. Ineffective assistance has been demonstrated where counsel purposefully declared his client's guilt to the jury, *United States v. Swanson*, 943 F.2d 1070, 1076 (9th Cir. 1991), abandoned the sole trial defense, *Profitt v. Waldron*, 831 F.2d 1245, 1248-49 (5th Cir. 1987), or failed to conduct any pretrial discovery or file a timely motion to suppress evidence. *Kimmelman*, 477 U.S at 387. Thus, as this Court has recognized, denial of the right to

effective assistance unquestionably undermines the fundamental fairness of the trial process. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

Under the rigorous standards this Court has established for ineffective-assistance claims, a conviction is invalid only if counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Judicial scrutiny of counsel's performance is highly deferential, employing a strong presumption that counsel's performance fell within the "wide range of reasonable professional assistance." *Id.* at 689. Moreover, even if the record demonstrates that defense counsel was completely incompetent, the defendant must prove that counsel's errors actually had an adverse effect on the defense.[21] The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the case of a guilty plea, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the defendant

[21] This standard applies to cases in which the defendant alleges "actual" ineffective assistance. Prejudice is presumed with respect to other types of ineffective assistance, including an actual or constructive denial of counsel, state interference or prevention of counsel from rendering effective assistance, *Strickland v. Washington*, 466 U.S. 668, 686, 692 (1984), and counsel acting with an actual conflict of interest that adversely affected performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980).

would not have pleaded guilty and would have insisted on a trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Under these rigorous standards, ineffective assistance of counsel claims cannot be established unless the proceeding being challenged was fundamentally unfair. *Strickland*, 466 U.S. at 696. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman*, 477 U.S. at 374 (citations omitted). The focus is on whether the result of the proceeding is unreliable because of a breakdown in the adversarial process that the criminal justice system counts on to produce reliable results. *Strickland*, 466 U.S. at 696. Many significant errors will not satisfy these demanding standards. *Cf. Kimmelman*, 477 U.S. at 382. Accordingly, a defendant who establishes ineffective assistance of counsel has necessarily shown that the proceeding resulting in his conviction was flawed and that the result of that proceeding is unreliable. These are precisely the concerns underlying *Gideon v. Wainwright*, 372 U.S. 335 (1963).

At bottom, the main difference between the rights recognized in *Gideon* and *Strickland* is that a defendant who satisfies *Strickland* has proved that there is a reasonable probability that deprivation of counsel in his case probably had an adverse effect on the adversary process, whereas *Gideon* recognizes that the mere possibility of such an effect is constitutionally intolerable. Rather than providing a reason to deny review, as the court of appeals believed (J.A. 150), the fact that a defendant asserting ineffective assistance of counsel must demonstrate actual

prejudice confirms that review of this claim must be permitted.

2. Involuntary and Unknowing Guilty Plea

This Court has also recognized that the acceptance of a plea of guilt which is not knowingly and voluntarily made deprives the defendant of the most fundamental federal rights guaranteed to criminal defendants under the Bill of Rights, including the privilege against self-incrimination, right to trial by jury, and right to confront adverse witnesses. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). A guilty plea does not constitute a valid waiver of these rights unless it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). A defendant cannot enter a voluntary and intelligent plea without "real notice of the true nature of the charge against him," *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)), and an understanding of "the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). It is the defendant who must "with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Brady v. United States*, 397 U.S. 742, 750 (1970).

The standard adopted by the court of appeals requires sentencing courts to ignore all claims of involuntary and unknowing guilty pleas, even if the defendant could prove that they were obtained through ignorance, incomprehension, breach of a plea agreement, blatant threats, coercion, or torture. *See, e.g., Gill v. Turner*, 443

F.2d 1064, 1064-65 (10th Cir. 1971) (guilty plea induced by police abuse and threat to file charges against brother); *Lassiter v. Turner*, 423 F.2d 897, 900 (4th Cir.) (plea induced by prosecutor's threat to revive barred charge), *cert. denied*, 400 U.S. 852 (1970); *Peete v. Rose*, 381 F. Supp. 1167, 1169-71 (W.D. Tenn. 1974) (plea based on counsel's threat that "Ku Klux" jury might sentence defendant to die in electric chair).

Imposition of a mandatory minimum sentence based on a conviction obtained in violation of the right to effective assistance of counsel or based on an unknowing and involuntary guilty plea erodes constitutional principles and forces the defendant to "suffer anew" from the earlier constitutional violation. Therefore, it necessarily follows from *Burgett* and *Tucker* that a sentencing court must consider such challenges to prior convictions offered to enhance punishment under Section 924(e). Punishing the defendant more severely on account of convictions that are themselves fruits of earlier constitutional violations cannot be squared either with the sentencing scheme Congress adopted or with rudimentary concerns of due process.

II. ECONOMY OF JUDICIAL RESOURCES AND THE COMITY CONCERNS RELIED ON BY THE FOURTH CIRCUIT FAIL TO SUPPORT LIMITATION OF REVIEW

A. Recognition of Constitutional Defects Should Not Depend upon the Degree of Factual Inquiry Required to Review a Claim

While acknowledging that prior convictions must be subject to review on grounds of denial of counsel, adjudication by a biased judge, and direction of a guilty verdict

by the court, the court below held that challenges based on ineffective assistance of counsel and unknowing and involuntary pleas may not be brought. J.A. 149-151. According to the court of appeals, violations of the right to counsel can ordinarily be determined from facial review of state court documents, whereas claims of the incompetence of counsel and the unknowing and involuntary nature of a guilty plea require a "fact-intensive" inquiry. J.A. 150-51. The suggestion that constitutional violations are to be recognized only when doing so involves no factual inquiry betrays an unacceptable view of judicial priorities. The protection of federal constitutional rights is an essential function of the federal courts. There can be no more important claims competing for the courts' time. Imposing a more severe sentence based on an earlier constitutional violation simply to avoid a factual inquiry is arbitrary and violates due process.

Moreover, the distinction drawn by the court of appeals is untenable. Deciding a claim of complete deprivation of counsel requires a determination of whether the defendant had counsel and whether he validly waived the assistance of counsel. Resolving the waiver issue requires a variety of factual inquiries. In determining the validity of waiver, a court must often consider matters such as the defendant's age, education and mental capabilities, familiarity with the criminal justice system, and awareness of the charges and penalties. *See, e.g. United States v. Belanger*, 936 F.2d 916, 918-919 (7th Cir. 1991); *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065-66 (11th Cir. 1986).

While underestimating the factual inquiry sometimes required to review *Gideon* claims, the court of appeals

exaggerated the factual inquiry involved in the claims it placed beyond review. As experience in other circuits has shown, claims that defense counsel failed to provide effective assistance, or that a guilty plea was not knowing and voluntary, can often be resolved with minimal inquiry. *E.g., United States v. Patrone*, 948 F.2d 813, 817 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2953 (1992); *United States v. Hope*, 906 F.2d 254, 263-64 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1640 (1991). The suggestion that such claims always involve more burdensome factual inquiries than do challenges based on *Gideon* or adjudication by a biased judge is incorrect.

B. Principles of Comity and Federalism Do Not Weigh in Favor of Sharply Limiting the Sentencing Court's Power to Review the Constitutionality of Prior Convictions

The court of appeals believed that "permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism." J.A. 147. Although it acknowledged that such challenges would not directly affect the state convictions, the court opined that a state court conviction "commands respect, in whatever forum and for whatever purposes it has come under challenge." J.A. 147. The court of appeals suggested that if Mr. Custis obtained relief in state or federal post-conviction proceedings, then, perhaps, he might seek resentencing in this case. J.A. 151.

The Fourth Circuit's comity concerns are misguided for several reasons. First, Maryland has expressly invited other jurisdictions to examine the validity of convictions

obtained in its courts before using them for sentencing enhancement. In *McMannis v. State*, 311 Md. 534, 536 A.2d 652 (1988), the Maryland Court of Appeals refused to consider a post-conviction petition brought by a defendant who had been sentenced as a recidivist in another jurisdiction, because his Maryland sentence had expired and he was no longer in custody. The court held that "[w]hen a challenge to the validity of a foreign predicate conviction is lodged, we believe it is the jurisdiction utilizing that foreign conviction for enhancement of sentence which should bear the responsibility of resolving that controversy." *Id.* at 544, 536 A.2d at 657. In view of this invitation, the comity concerns on which the Fourth Circuit relied are illusory.

More generally, the exercise of federal judicial power in sentencing hearings does not involve assertion of jurisdiction over a state criminal case. *United States v. Paleo*, 967 F.2d 7, 12 (1st Cir. 1992). Considerations of comity are largely absent when a federal court's examination of a prior state conviction neither overturns the conviction, frees a state prisoner, nor otherwise interferes with the state's authority. *Id.* State courts do not wish to be burdened with constitutional challenges filed by federal defendants, who usually will have completed any state sentence and will no longer be in state custody. Simply put, states seldom have an interest in the length of a federal defendant's sentence.

In this case, Custis merely informed a federal court that it should not exercise its own punitive power based on prior judgments resulting from earlier constitutional violations. The minimal impact of such a claim on state interests distinguishes this case from *Parke v. Raley*, 113 S.

Ct. 517 (1992), in which a federal habeas petitioner asked federal courts to regulate the procedures state courts may use when determining the effect of their own prior judgments.[22] No tension results between the federal and state judicial systems when a federal sentencing court examines a state conviction for the limited purpose of federal sentencing enhancement, which has an exclusively federal aim. The highest court in the state that rendered the convictions challenged in this case did not identify any costs to the state from review of state court convictions in this limited fashion. *See McMannis*, 311 Md. at 542-47, 536 A.2d at 656-58.

The opinion of the court of appeals actually *undermines* comity considerations by burdening busy state courts with litigation on federal questions in which the state has no interest. The Fourth Circuit's suggestion that the defendant pursue relief in state and federal post-conviction proceedings (J.A. 151) would only further

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[22] In *Parke*, this Court rejected a challenge to the procedures used by the courts of Kentucky for adjudicating *Boykin* claims when offered for sentencing enhancement under state law. The Court rejected the argument that due process forbids a state to require defendants to produce evidence of inadequate advisement of rights with respect to a guilty plea, or requires that *Boykin* claims ultimately be decided on a higher standard than a preponderance of the evidence. In ruling that this scheme did not violate due process, the Court observed that a presumption of validity attaches to prior convictions, at least where no transcripts or other records of the earlier plea colloquies exist. 113 S. Ct. at 523-24. Of course, that a presumption of validity applies does not mean that the presumption should be conclusive and unrebuttable. In fact, the procedures under review in *Parke* permitted the defendant to rebut the presumption of correctness. *Id.* at 520.

delay and complicate the sentencing process. First, a defendant would receive a dramatically more severe sentence in federal court, with the prior conviction automatically counting for enhancement regardless of its constitutionality. While in custody in federal prison, and usually without any lawyer to assist him, the defendant would then have to proceed to state court to pursue post-conviction remedies. If the defendant did not prevail in state court, he would next file a petition in federal court under 28 U.S.C. § 2254, again without the assistance of counsel. At the conclusion of all those proceedings, the defendant would file a petition under 28 U.S.C. § 2255 to attempt to correct the federal sentence. Burdening both state and federal courts with such duplicative and unnecessary proceedings hardly serves the interests of comity and federalism. *See Paleo*, 967 F.2d at 12-13.

The Fourth Circuit's ruling would leave many defendants with no means of preventing imposition of the mandatory minimum sentence under Section 924(e) based on an unconstitutional prior conviction. Contrary to the Fourth Circuit's assumption (*see* J.A. at 151), there is no state post-conviction review available for Custis's constitutional challenges. A post-conviction petition may be filed in Maryland only if the petitioner is incarcerated or under parole or probation supervision in connection with the conviction at issue. *See* Md. Ann. Code art. 27, § 645A(a)(1992); *McMannis v. State*, 311 Md. 534, 539-41, 536 A.2d 652, 654-55 (1988)(defendant cannot satisfy "in custody" requirement of Maryland post-conviction statute by showing that another sentence was enhanced due to Maryland prior conviction). Usually, the defendant will have completed his state term of incarceration before

being charged with a violation of 18 U.S.C. § 922(g). Accordingly, the Fourth Circuit's opinion leaves a large class of defendants, including Custis, with no means of preventing the use of unconstitutional prior convictions to invoke the mandatory minimum penalty under Section 924(e).

A defendant's failure to have previously brought a constitutional challenge does not, as the Fourth Circuit believed, demonstrate that his claims lack merit and are not worthy of review. J.A. 149. Failure to pursue post-conviction relief may instead stem from lack of access to counsel, incarceration out of state, or ignorance that viable claims exist. Some claims, such as ineffective assistance of counsel, generally cannot be raised on direct review. As this Court has observed, "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." *Kimmelman*, 477 U.S. at 378 (citation omitted). Failure to raise a claim previously is particularly insignificant where, as here, the state judge advised the defendant that a claim challenging counsel's performance would probably not succeed. J.A. 29. Moreover, post-conviction review is never an option in some cases, such as the 1989 conviction for which Custis received a two-year suspended sentence and was therefore never in custody or even on probation or parole. J.A. 47-48.

Realistically, no defendant is likely to lodge an immediate constitutional challenge to a conviction under circumstances such as those involved here, where the

sentence for one conviction was entirely subsumed by a concurrent sentence the defendant was already serving, and the sentence for the other conviction was entirely suspended. As the Fourth Circuit explained in a case brought under the since-repealed Dangerous Special Offender statute:

> [T]here will be times when a colorable constitutional question has not been reviewed, perhaps because the defendant received a minimal sentence, and consequently the defendant or his overburdened public defender saw nothing to gain by pursuing an appeal or collateral relief. In such a situation, the arguably infirm conviction is only of consequence to the defendant when it is later used to establish special offender status.

United States v. Scarborough, 777 F.2d 175, 182 n.7 (4th Cir. 1985). After completing any sentence received, a defendant ordinarily has no opportunity to challenge the infirm conviction and it is of no further consequence unless later offered in support of an enhanced sentence. For all of these reasons, it is fallacious to assume that claims regarding prior convictions lack merit if not previously asserted.

C. Federal Courts Have Developed Procedures for Efficient Resolution of Constitutional Challenges to Prior Convictions

The Fourth Circuit expressed concern that permitting defendants to challenge the constitutional validity of prior convictions would place a substantial burden on prosecutors and district judges as well as complicate and

delay federal sentencing proceedings. J.A. 146. This concern is unfounded. As explained above, and as the First Circuit observed in *Paleo*, a rule requiring federal courts to assume that past convictions are valid "would likely increase delay, as defendants are sent from one court to another to press their various challenges." 967 F.2d at 13. Moreover, there is no evidence that the eight circuits that have routinely entertained constitutional challenges to prior convictions offered under Section 924(e) have experienced the problems that concerned the court below. Such problems are unlikely to arise, given the burden-shifting rules of proof and procedural rules that guide the consideration of constitutional claims.

The lower courts that entertain challenges to prior convictions have placed the burden of establishing unconstitutionality on the defendant. *Paleo*, 967 F.2d at 13; *United States v. Stewart*, 977 F.2d 81, 84-85 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 1433 (1993); *United States v. Taylor*, 882 F.2d 1018, 1031-32 (6th Cir. 1989), *cert. denied*, 496 U.S. 907 (1990); *United States v. Gallman*, 907 F.2d 639, 643 (7th Cir. 1990), *cert. denied*, 499 U.S. 908 (1991); *United States v. Day*, 949 F.2d 973, 982-83 (8th Cir. 1991); *United States v. Mulloy*, 3 F.3d 1337, 1339-40 (9th Cir. 1993); *United States v. Wicks*, 995 F.2d 964, 978 (10th Cir. 1993), *cert. denied*, (Nov. 15, 1993) (No 93-6303); *United States v. Ruo*, 943 F.2d 1274, 1276 (11th Cir. 1991). *See also Parke*, 113 S. Ct. at 525 (not fundamentally unfair to require a defendant to produce evidence of noncompliance with *Boykin* when no transcript exists). This widely adopted burden-of-proof rule ensures that the government need not prove the constitutionality of convictions in the first instance.

In addition, some courts have set forth specific procedural requirements for claims, requiring the defendant to state the grounds claimed for the prior conviction's unconstitutionality, as well as the anticipated proof of invalidity, and to provide an estimate of the process and time needed to obtain any required evidence. *E.g., United States v. Aloi*, ___ F.3d ___, 1993 Westlaw 435270 (6th Cir. 1993). Several courts have examined factors such as the defendant's prior exposure to the criminal justice system, and the state court's custom, practice, and rules in determining whether claims are meritorious. *Stewart*, 977 F.2d at 85 (prior exposure to justice system); *United States v. Dickerson*, 901 F.2d 579, 583 (7th Cir. 1990) (state court's custom and practice). Conclusory assertions of constitutional violations can be rejected with minimal inquiry. *United States v. Hope*, 906 F.2d 254, 263 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1640 (1991). These procedures facilitate efficient review of constitutional claims.

District courts have the experience and capability to resolve claims of this nature expeditiously. Rule 32 of the Federal Rules of Criminal Procedure sets forth sentencing procedures and generally requires that courts resolve disputed sentencing issues. Fed. R. Crim. P. 32(a)(1); (c)(3). The kind of information a sentencing court may consider and the sources from which it may come is largely unlimited. 18 U.S.C. § 3661; *Roberts v. United States*, 445 U.S. 552, 556 (1980). The district court has wide discretion in deciding whether an evidentiary hearing is needed. In many cases involving constitutional challenges, the defendant's claim can be fully adjudicated on the basis of the existing record. Assessment of a claim can often be

based on court documents, written arguments, proffers, or affidavits.[23]

Because of the rigorous standards for evaluating ineffective assistance of counsel claims, only in rare cases will the defendant advance a viable claim. Furthermore, Rule 11 of the Federal Rules of Criminal Procedure and the analogous state rules, which have been in effect for nearly a quarter-century, generally provide a complete record of the factors relevant to the determination of whether the plea is knowing and voluntary. Therefore, the number of defendants likely to raise constitutional challenges to prior convictions used for sentencing enhancement under the Armed Career Criminal Act is small and probably diminishing over time.

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[23] In this case, for instance, the district court initially narrowed the claims regarding the 1985 conviction to a single issue, and rejected the claims regarding the 1989 conviction based solely on the papers submitted, and without submission of any response from the government. As explained *supra* at pp. 6-7, the court later refused to consider the claims or make any findings at sentencing. J.A. 51.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the case should be remanded for resentencing.

Respectfully submitted,

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APPENDIX

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CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * * * * "

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, Section 1, provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law * * * * * "

STATUTES

18 U.S.C. §§ 921, 922, and 924 (Supp. 1993)

1. 18 U.S.C. § 921(a)(20) states:

The term "crime punishable by imprisonment for a term exceeding one year" does not include –

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. 18 U.S.C. § 922(g) provides:

It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year * * * to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. 18 U.S.C. § 924(e) provides, in pertinent part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence

of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection –

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.